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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-943

INTERNATIONAL AIR INDUSTRIES, INC. and VEBCO, INC.,

Petitioners,

versus

AMERICAN EXCELSIOR COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on August 18, 1975.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in CCH Trade Cases, in paragraph 60,447 and 517 F.2d 714 (5th Cir. 1975). A copy of the opinion is attached hereto as Appendix A. No opinions were issued by the District Court. The judgment of the District Court is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 18, 1975. The order overruling petitioner's motion for rehearing was entered on October 8, 1975. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in holding that predatory intent cannot be proved unless the respondent's prices are below its marginal or average variable costs even though respondent:

1) attained its monopolist position through acquisition of its competitor companies;

2) was many times the size of petitioner companies;

3) engaged in industrial espionage;

4) terminated petitioner's distributorship;

5) engaged in false advertising which disparaged petitioners' product;

6) maintained higher prices in other geographic areas;

7) by-passed its other distributors to sell directly only to petitioners' customers; and

8) applied financial pressure by establishing a "hold file" on petitioners' invoices so that petitioner's cash flow position would be hurt;

and even though the management of respondent AMXCO had made it abundantly clear from their intra office correspondence what their intent was with respect to the new competition of petitioner companies, to-wit:

1) a commitment to "stunting the possible growth of Vebco" [R. - 473];

2) a recognition by respondent officers that the new pricing cuts were taking their toll and that "El Paso was American Excelsior Territory" [R. - 474];

3) a management attempt to purchase petitioner's only supply of wood and "make it rather difficult for them to continue their operation" [R. - 471];

4) a recognition by management that if petitioners were to be discouraged it must be hit "hard" or petitioner might become "entrenched" [R. - 479];

5) a statement that AMXCO's "fair share" of the new pad business was near "100%" [R. - 484]; and

6) a recognition by management that by pricing its pads low enough that petitioners could not profit it would also lock out its only other viable competition from the El Paso market [R. - 485].

II. Whether the Court of Appeals erred in holding that petitioners received a fair and impartial trial even though:

1) evidence relating to respondent's acquisition of competitor companies was disallowed;

2) evidence of the attempts to purchase petitioners' wood supply was disallowed;

3) evidence of all of respondent's pricing outside the El Paso area was disallowed even though a stipulation as to that pricing had been entered into;

4) evidence that a manager of one of petitioners' customers quoted a respondent salesman as agreeing that respondent wanted to put petitioners "out of business" was disallowed;

5) the court failed to inform the jury that the lengthy stipulation among the parties was conclusive as to the facts which were agreed to therein;

6) the court failed to inform the jury that all the elements of a Robinson-Patman claim had

been stipulated to except for the proscribed effects on competition and damage to petitioners; and

7) the district court interjected himself into the trial in such a way as to prejudice materially the petitioners' case by exclusion of petitioners' evidence continuously throughout the trial without prior objection by counsel, by stating to the jury on several occasions that petitioner's proffered evidence had nothing to do with the charges and by failing to allow petitioners to develop its testimony in an orderly manner and taking over completely the questioning of petitioners' expert witness.

III. Whether the Court of Appeals erred in holding there was sufficient evidence to support the "good faith meeting of competition defense" even though it was uncontroverted that respondent's price cutting was at least ten percent (10%) below petitioners' pricing to the same customers, that the price offered did not require a quantity purchase and that respondent had actual knowledge of petitioners' prices prior to making its price cuts.

STATUTES INVOLVED

The statutory provisions involved are Section 2 of the Clayton Act, 38 Stat. 731, Sec. 2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, Sec. 1 (1936), 15 U.S.C. Sec. 13 (1973), Sections 4 and 16 of the Clayton Act, 38 Stat. 731, Secs. 4 and 16 (1914), 15 U.S.C.

Secs. 15 and 26 (1973) and Section 2 of the Sherman Act, 26 Stat. 209, Sec. 2 (1890) as amended 69 Stat. 282 (1955), 15 U.S.C. Sec. 2 (1973); United States Constitution, Amendment VII. These statutes are set out in Appendix C attached hereto.

STATEMENT OF THE CASE

This was an action brought by Vebco, Inc. ("Vebco") and International Air Industries, Inc. ("International"), petitioners, to recover damages and injunctive relief under the Clayton Act as amended by the Robinson-Patman Act for price discriminations by the respondent American Excelsior Company* which injured competition in the sale of evaporative cooler pads at both the primary and secondary levels. They also sought the same relief under the Sherman Act for an attempted monopoly of the evaporative cooler pad market in the southwestern states of the United States. The seven-man jury returned a defendant's verdict on all the claims.

The Court of Appeals concluded that all the alleged points of error made by the District Court were meritless. The Court of Appeals for the Fifth Circuit also held that predatory intent could only be proved if the respondent's prices were below its marginal or average variable costs for cooler pads.

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* American Excelsior Company was the named defendant in the District Court but during the course of discovery it developed that AMXCO, Inc. was the corporate successor to that company. Throughout this petition the respondent will be referred to as AMXCO.

STATEMENT OF FACTS

1. Vebco

Vebco, Inc. is a New Mexico corporation, qualified to do business in the State of Texas and has its principal place of business in El Paso, Texas. It is the successor to a sole proprietorship established in 1950 by Vernon E. Britt, President of Vebco, and was incorporated in 1959. [R. - 132] Mr. Britt and his son, Paul E. Britt, are the principal shareholders of the company.

Vebco is presently engaged in the business of distributing certain heating and air conditioning equipment, some of which equipment it manufactures itself. [R. - 188, 189] It distributed cooler pads for AMXCO and its predecessor from 1953 through 1971. It began to manufacture evaporative cooler pads in January 1972. Its only warehouse is located in El Paso, Texas, but it has customers in all the southwestern states with the exception of Nevada. [R. - 144]

2. International

International Air Industries, Inc. is a Texas corporation with its principal place of business in El Paso, Texas. International was incorporated in 1969 for the purpose of manufacturing evaporative cooler pads and evaporative cooler covers. The original owners of International were Vernon E. Britt, Paul E. Britt and three others, but in 1970 the Britts, through Vebco, acquired control of the company. [R. - 141-142]

3. American Excelsior Company (AMXCO)

Defendant respondent, AMXCO, Inc., a corporation with its principal place of business in Arlington, Texas, manufactures, *inter alia*, evaporative cooler pads for use in evaporative type air coolers. It is a subsidiary of Texstar Company, a publicly held, diversified corporation, and markets its products nationally. It first began manufacturing cooler pads in 1953 or 1954 when it acquired two established manufacturing companies, Western Wood Excelsior in Los Angeles, California and Western Aspen Excelsior in Arlington, Texas. In 1960 American Excelsior acquired still other manufacturers of cooler pads, Texas Excelsior Corporation and Palmer Manufacturing Company in Phoenix which was AMXCO's largest competitor at that time. [R. - 108-125] In approximately the middle of 1970, AMXCO negotiated to purchase the petitioning companies, International and Vebco, but the purchase was not consummated. [R. - 403-414, R. - 213-218] Later, near the end of 1970 AMXCO negotiated to purchase its largest competitor in the Arizona, northern New Mexico and Texas Panhandle areas. Again the purchase was not consummated. [R. - 108-125]

Although AMXCO was the world's largest producer of cooler pads, [R. - 67-71] it had no competition selling in El Paso area as late as 1968. In 1968 it had no manufacturing competition anywhere in the southwestern United States. [R. - 229] It had in excess of 69% of that market each year for the next three years, however, [R. - 491] petitioners were not allowed to introduce evidence of how that market position was attained.

Robert Case, President of Southwest Industries, upon his deposition testified that American Excelsior had systematically merged with or acquired at least four companies in the cooler pad manufacturing business from the years 1953 to 1968 [R. - 108-125]. The court failed to admit evidence of any of the mergers or acquisitions apparently on the ground that it had nothing to do with the lawsuit before it. [R. - 296]

The court admitted evidence relating to the negotiations among the parties to get the petitioners out of the pad manufacturing business but evidence of the same type of negotiations between AMXCO and Southwest Industries about which Robert Case had deposed was ruled inadmissible. [R. - 436, 437]

In December 1970, just prior to the AMXCO price cutting activity in El Paso, respondent had broached the possibility of Southwest's selling out to AMXCO. Financial data was turned over to AMXCO and discussions were held between the companies in Arlington, Texas. The negotiations fell through and it was the opinion of Mr. Case that "at that particular time they were more interested in what kind of statement we had, and some sales figures and so forth, more so than they were in talking about, you know, actually getting together on a merger or a buy out." However, none of this evidence was admitted by the district court. [R. - 108, 125]

4. The relevant market

The parties agreed that the relevant product market was the evaporative cooler pad market. The cooler pad

is made of aspen wood shavings, otherwise known as "excelsior", which is then covered with a crinoline cloth. The cooler pad is one of the components of the evaporative type air cooler which is commonly used in the dry southwestern United States to cool homes, offices and industrial plants. [R. - 133, 134]

The evaporative cooler pads are inserted into the cooler, water is pumped across the pads and the air is pulled across the wet pad. As the water evaporates the air is cooled. Of course, a dry climate is essential to the efficient operation of the evaporative cooler. [R. - 133, 134]

Although AMXCO beginning in 1960 sold a machine made pad as opposed to the handmade pad manufactured by International and Vebco, it was stipulated among the parties that for purposes of the lawsuit each of the pads was of the same grade and quality and was interchangeable in its use. [R. - 67-71]

The parties disagreed, however, as to the relevant geographic market. The original complaint alleged both a geographic price discrimination by AMXCO and also local price discrimination in the El Paso, Texas — Las Cruces, New Mexico area. [R. - 1]

After the initial discovery was completed and the books and records of AMXCO had been examined, the petitioners amended their complaint and filed a supplemental complaint alleging geographic and local price discriminations and price discrimination throughout the southwestern United States. Additionally, a Sherman Act Section 2 violation of

attempted monopoly throughout the southwestern states of the United States was alleged. [R. - 6, R. - 21]

The contention of the petitioners was that the relevant geographic market was a fact question to be determined by the jury on the basis of where the parties competed or might have competed had economic forces been working freely.

Paul Britt testified that approximately eighty-five percent (85%) of Vebco's cooler pad sales were made within an approximate 250 mile radius of El Paso, which included both Tucson, Arizona and Albuquerque, New Mexico. [R. - 455]

Vebco operated its own trucks and a warehouse in Arizona was planned (but was never built because of the atmosphere created by the illegal price cutting activity of AMXCO). Vebco's ability to compete favorably would have been enhanced with such a warehouse.

Furthermore even the division manager of AMXCO agreed that Vebco could have competed in Arizona. Carl Gillespie stated:

> I was speaking in terms of the area they were to serve, that Vebco was to cover, and if they're going to upset us in Phoenix and Southern California and all of the other branches that they have, which they could do. They could very easily go in there and demoralize the market with one truckload of pads, and we should try to discourage them.

* * *

> We just — somehow we had to indicate to them we weren't going to let them do that. [R. - 431]

Petitioners requested the court to instruct the jury that the jury must

> determine the relevant geographic market; that is the area in which the petitioners and respondent were competing during the period involved in the suit. In making this determination, you may take into consideration the area in which the parties actually sold, the areas in which they attempted to sell, and finally, the areas into which they might reasonably have been expected to extend their efforts to sell in the reasonably foreseeable future. [R. - 43]

The last sentence of the requested instruction was not given. [R. - 85]

Respondent AMXCO argued that as a matter of law the relevant geographic market was the El Paso-Las Cruces trade area. Additionally, its theory was that the year 1971 was the relevant time period. Accordingly, the court instructed the jury that El Paso-Las Cruces was the relevant geographic market. [R. - 97]

Before trial a lengthy stipulation [R. - 67-71] had been entered setting out various prices charged by AMXCO throughout the southwestern United States. However, when the stipulation was to be read to the jury, petitioners learned for the first time that AMXCO had certain objections concerning the relevancy and the materiality of certain of the prices which had been stipulated. [R. - 344, 345]

Such stipulation had been relied upon by petitioners as an integral and important part of its proof. It was thought to have done away with the requirement for the admission of hundreds of AMXCO invoices which would have cluttered an already extensive record. Nevertheless, the district court ruled that all pricing outside El Paso-Las Cruces would be omitted from the stipulation. The ruling was based on the court's opinion that the case had not been "fully developed" outside El Paso-Las Cruces area. [R. - 457] But the very reason that the case had not been fully developed was because of the petitioners' reliance on the stipulation and that the court would not admit any evidence of illegal activity in any area other than El Paso-Las Cruces.

5. The interrelations of the parties and the alleged antitrust violations

The business relationship between Vebco and respondent AMXCO had been lengthy, if not entirely satisfactory. Mr. Vernon E. Britt, founder of Vebco, began distributing pads for a predecessor of AMXCO in 1953. At that time AMXCO's predecessor was making a handmade pad and had few customers in the El Paso-Las Cruces area. [R. - 132, 135-138]

Mr. Britt expanded his merchandise line from brass fittings only in 1950 to a full line heating and cooling distributor, including a large number of specialty lines such as polyethylene packaging of brass fittings and cooler accessory kits. [R. - 188, 189]

From 1953 to January, 1969, with the exception of 1956, Vebco distributed only AMXCO's or its

predecessor's pads. In 1956 Vebco had briefly manufactured its own pads from excelsior purchased from an outside source. [R. - 138]

Historically Vebco's primary customers in the El Paso-Las Cruces trade area were the discount stores. The only large discount store to whom they did not sell cooler pads was K-Mart. [R. - 254] That store was serviced by Passage Supply, an independent distributor for AMXCO. [R. - 224]

Over the years Vebco's evaporative cooler pad sales had grown from $66,750.00 in 1968 to $112,300.00 in 1972 and its sales in all lines had risen from $128,846.00 in 1961 to $885,895.00 in 1972. [R. - 347-349] From 1968 to 1970 in only one branch of AMXCO, sales of pads went from $233,442.00 to $360,458.00. [R. - 422, 423] This was only one branch of several and a branch serving a market which supposedly was not good for cooler pads. [R. - 380, 381] The El Paso branch sold as many pads in 1968 in one month as Vebco sold all year. [R. - 444a]

Although Vebco's overall profits increased in 1971, its cooler pad sales in the El Paso-Las Cruces area were down 16%. [R. - 274] Furthermore, the price cutting activity of AMXCO did not begin until the season was in full swing. When AMXCO continued its activities in 1972 Vebco's cooler pad sales were off by $17,150.00 from the previous year and $9,800.00 below 1970 sales. [R. - 350] This does not even take into account the reduced profit margins because of the reduced prices and the phenomenal growth Vebco had experienced in prior years nor the lost good will of Vebco.

AMXCO became the world's largest producer of cooler pads primarily through a series of acquisitions of smaller manufacturing concerns. Additionally, over the years it had taken certain other action which had made it less appealing for its competitors to remain competitors rather than becoming customers. For instance AMXCO penetrated the southern California market by lowering the prices of its pads to the existing manufacturers in that area so that those manufacturers would no longer manufacture pads in competition with it. [R. - 108-125] This evidence was omitted by the trial court and such action was endorsed by the Court of Appeals as being "socially and economically justifiable."

Except for direct sales to "national accounts" such as Sears Roebuck, Montgomery Ward and White's Auto, in the El Paso-Las Cruces area AMXCO marketed all its cooler pads through independent distributors such as Vebco. [R. - 28] [R. - 67-71] AMXCO's policy had been to ship cooler pads, freight prepaid, to any customer of a distributor regardless of the customer's location. Typically AMXCO's shipment would be from its warehouse nearest the Vebco customer; therefore AMXCO's cost for shipping to a Vebco customer in Arizona, for example, would not exceed its cost for shipping to another distributor's customer in Arizona, and under this policy Vebco sold AMXCO pads at competitive prices outside the El Paso-Las Cruces area. [R. - 140, 151, 152] [R. - 325, 424-425, 445-448]

AMXCO sold cooler pads to Vebco at a price of 10% off the published distributor price sheet for freight car

quantities and Vebco purchased approximately 72,000 pads from AMXCO for resale during 1968. [R. - 139, 140, 143, 145] [R. - 67-71]

Late in 1968 Vebco was advised that AMXCO would no longer ship cooler pads, freight prepaid, to Vebco's customers unless such customers were in the El Paso-Las Cruces area. The consequence of this change in policy was that Vebco's ability to make sales of AMXCO pads at competitive prices was contained within the El Paso-Las Cruces area. [R. - 140] [R. - 424-425]

As a consequence of the above change in AMXCO's policy, Vebco began to look elsewhere for a supply of cooler pads. It therefore accepted an opportunity to purchase a minority interest in a cooler pad manufacturing company to be formed by three former AMXCO employees, which company became International, a petitioner in this suit. [R. - 141-143]

In early 1969 AMXCO learned that Vebco planned to purchase pads from the new company, whereupon AMXCO's El Paso branch manager wrote Vebco as follows:

> Due to the fact that your company, International Air, has gone into the business of manufacturing cooler pads in direct competition with this company, we can no longer qualify you as a distributor of our cooler pads or other allied lines. [R. - 489]

This was followed by a radio campaign in the El Paso area to warn the public against the use of "hand-

made" cooler pads. The AMXCO radio announcements falsely indicated that the use of handmade pads would cause cooler motors to burn out. [R. - 144, 145]

As to all its distributors other than Vebco, AMXCO also then reinstated its policy of shipping pads, freight prepaid, to any customer of a distributor regardless of the customer's location. [R. - 326, 427, 445-448]

In the fall of 1969 representatives of AMXCO and Vebco met to discuss the following: 1) International's possible purchase of excelsior "mats" from AMXCO, 2) AMXCO's possible manufacture of a cooler pad for Vebco according to its specifications for sale during the 1970 season under the Vebco label, 3) AMXCO's possible purchase from Vebco of water pumps and other cooler accessories to be manufactured by Vebco under the AMXCO label, and 4) AMXCO's possible purchase of International. An agreement, later referred to as the "buy-sell" arrangement, was reached on items 2) and 3). [R. - 201-202] [R. - 397-402]

It was agreed that nothing could be done on the above item 4) while AMXCO's former employees were associated with International, but AMXCO offered to loan $20,000.00 to Vebco for its purchase of those former employees' interests in International. That offer was accepted and Vebco acquired those interests in January 1970. [R. - 201, 202] [R. - 399-403]

Negotiations with AMXCO then became more concentrated and continued throughout the year. Financial data was provided AMXCO concerning the opera-

tion. Several key employees of AMXCO including its president, D. D. Albers, were given guided tours through the International facility. [R. - 212, 213] [R. - 400-414]

After the selling season, however, and before the end of 1970 it became apparent that no agreement for AMXCO's acquisition of International could be reached. At that time a joint venture between Vebco and AMXCO was proposed whereby a third company would be formed. No agreement was reached and late in 1970 it was agreed that the buy-sell arrangement would continue through the 1971 season. [R. - 400-414]

Paul Britt informed the AMXCO representative that International would be producing most of the Vebco pads in 1971 and would purchase only five freight cars of pads from AMXCO during the 1971 season. [R. - 216-219]

AMXCO then began to exert financial pressure on Vebco. Although the "buy-sell" agreement required AMXCO to pay for the Vebco goods it purchased within twenty-five days of the invoice date, in late 1970 and early 1971 AMXCO refused to pay according to the agreed terms. The putative reason was that AMXCO was concerned about the two carloads of pads carried over by Vebco from the previous year which had not yet been paid for, even though the local AMXCO manager had previously agreed that the payments would not be due until June 1971. [R. - 324] At the same time, AMXCO personnel were trying to get Vebco to take delivery of three additional carloads with a June 1971 billing. [R. - 147] [R. - 328, 335]

In early 1971 and late 1970 Vebco representatives made their usual early season calls on the El Paso-Las Cruces area discount stores, which stores had traditionally been Vebco's primary customers in this area. The price quoted was 10% off the Vebco price sheet* for a trailer load of pads and 5% off for a "bob tail" load. Substantial sales orders were obtained. [R. - 222, 223]

In late January 1971, Vebco dropped its price to a 14.5% discount, to meet competition in Las Cruces from AMXCO. [R. - 149] [R. - 225] As it turned out the information the price change was based upon that AMXCO was selling direct to Surplus City at a discount of less 10%, less 5%, a price which Vebco was meeting was incorrect, but only to a certain extent. It was not AMXCO who was making the offer but one of its distributors, West Texas Wholesalers out of Abilene, Texas. [R. - 283, 284, 285, 365] Nevertheless, Vebco did lower its price an additional 5% not only in Las Cruces but in El Paso, the reason being that the Las Cruces store owner also had a store in El Paso. [R. - 263] At that time K-Mart placed an order for Vebco pads.

Contrary to the Court of Appeals' opinion, at no time did Vebco ever offer a price below that of AMXCO's. At that time, of course, AMXCO was selling only to distributors (including Vebco itself) and national accounts.

In February 1971, Mr. Carl Gillespie, the division manager of AMXCO who was in charge of the El Paso

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* The Vebco and AMXCO prices from the price sheets used during this period were identical.

area came to El Paso and "balanced" the accounts of the two companies. His report concerning that El Paso meeting concluded that the "problem of what would be the best route to take to accomplish the one matter of most interest to us, that being that we want our pads to be the pads that are being sold at the dealer level in El Paso" should be solved in March. [R. - 482-483]

On March 1, AMXCO requested Vebco's order for the remaining three of the five carloads of pads which Vebco had indicated it would purchase from AMXCO in the 1971 season, but Vebco did not place the order. [R. - 328, 331]

Immediately AMXCO determined to bypass its El Paso distributors and sell directly to the discount stores. [R. - 328, 329, 332]

On March 2, 1971, Vebco began to receive calls from its various discount store customers that AMXCO was offering to sell direct to them for the first time and at a discount of twenty-five percent (25%), without regard to quantity purchased. [R. - 229]

The management of Vebco conferred and decided that if the AMXCO price could be verified, Vebco would meet the 25% discount to avoid a loss of sales. A Vebco salesman was immediately dispatched to the various stores with instructions to pick up AMXCO price sheets from the various store buyers to verify the offered discount. Upon verification of the price Vebco informed the stores that it would meet the 25% discount of AMXCO, [R. - 230] and as a result none of the customers switched to AMXCO at that time.

Next AMXCO reduced its prices to the El Paso-Las Cruces area discount stores to a discount of 32.5%. An AMXCO representative testified that they had no idea what the market price was at the time and that the decision to lower the price was done solely because they had made no sales at the less 25% price. [R. - 322]

However, several of the other AMXCO employees testified they knew that they lost the K-Mart account at "three fives" off or "15%" off. [R. - 327] AMXCO's primary distributor in El Paso, Bill Paschich, had given them that information. It is clear that at the time Vebco offered the less 10%, less 5% discount to K-Mart, Vebco was bidding against itself. [R. - 272] In fact Paschich testified that his only offer to K-Mart was less 3% in February, which was made after the Vebco offer of less 10% less 5%. [R. - 308-311] Furthermore, AMXCO knew that the large majority of Vebco inventory had been purchased at a 23.5% discount.

Frank Turner, El Paso branch manager for AMXCO, testified that no one from AMXCO asked for substantiation of any competitors' price, only whether AMXCO's price was "competitive." It was later developed that "competitive" was the jargon of the trade meaning "better." [R. - 316]

One of the considerations allegedly used in setting the initial AMXCO price cut was Southwest Industries price to Gibson's Discount Store but Gibson's did not even have a store in the area at that time.[R. - 334]

Additionally, it is undisputed that Paul Britt wrote AMXCO a letter March 8, 1971. [R. - 463] stating exact-

ly what the Vebco price was. He testified that later he told both Turner and Webb that Vebco would continue to meet the AMXCO prices to retain its customers. The testimony stands uncontroverted.

On or about March 15, 1971, upon receiving information that AMXCO had reduced its price another ten percent (10%), Mr. Britt, in addition to dispatching his salesman to collect additional AMXCO price sheets, requested Surplus City to purchase pads at the AMXCO price as further verification. Pads were purchased at that price and a copy of the invoice was given to Mr. Britt as proof of the market price. [R. - 235]

Vebco again informed its customers it would meet the AMXCO price of less 32.5%. However, this was possible only for approximately two weeks and on March 29, 1971, it was necessary for Vebco to go back to the less 25% discount of March 2. [R. - 238] Upon informing Vebco's customers on March 29, 1971, that it could not continue the additional 10% reduction it was discovered that AMXCO had dropped its price by yet another 10% discount, making its price a discount of 39.25% without regard to the quantity ordered. [R. - 239] [R. - 315]

After March 29 Vebco began to lose sales to AMXCO, with the effect as shown by the reproduction of petitioners' Exhibit 19 in the Record at 464.

In March 1971, at the time AMXCO was offering pads to Vebco customers at a 32.5% and 39.25% discount these were the lowest AMXCO prices in the nation. At the same time AMXCO was offering pads to Vebco

customers at a 32.5% discount, it was offering pads to others in the El Paso-Las Cruces area at discounts ranging from 10% to 23.5% [R. - 67-71]

On March 16, 1971, at the request of AMXCO's president, D. D. Albers, Mr. Gillespie reviewed and formulated "an up-to-date opinion of the competitive situation." [R. - 485-487] His conclusions were that:

> Vebco has become a real competitor in the El Paso area,

and that

> Loss of any sales to Southwest Industries or Vebco, although they may prove to be non-profitable to them, will result in reduced production requirements . . . which will increase unit cost of production.
>
> I would conclude that we cannot afford the luxury of being complacent, unless we have made plans to correct the situation in the coming season. I am not at all sure what approach is proper; retain as much profit as possible this season with a revised program for next season as opposed to taking a real "bath" right now while making use of available plant production at Englewood in the months of April, May and June.

Among his recommendations were the following:

1. Offer prices in El Paso low enough to insure that Vebco cannot profit from competitive priced sales. Stock our warehouse in El Paso "to the brim" to insure ability to deliver promptly.

A. A side benefit would be that Southwest Industries would be "locked out" of the El Paso Market area.

B. Another side benefit would be the added production requirements for the Englewood Plant.

2. Continue to police all possible Southwest Industries customers to apply pressure by meeting their offerings as they become evident, on a case to case basis.

3. Begin planning for a change in sales policies for the next season to "up date" our approach to sales through distributors to be compatible with a program of direct sales to all large discount and chain groups.

One day later Gillespie wrote another memorandum to his Division Sales Manager, June Morris, re "Cooler Pad Sales Approach in El Paso." [R. - 472-473] Some of his comments were:

> Probably we should also think of what benefits we might derive from localizing this price struggle as much as possible. If Vebco is hard pressed to supply the local customers in

> El Paso and perhaps Las Cruces, they certainly will not be too interested in spreading out to Tucson and Phoenix.
>
> June, if we are committed to a program of stunting the possible growth of Vebco and keeping our foot in this quite sizeable cooler pad market, then the real question we have is just what price do we need to determine as our lowest price level. Should it be the 50¢ figure for a No. 1 cooler pad covered, or should it be perhaps even a little lower. Since the season is just about ready to break, I would think that we need to establish whatever price is now determined, at once, and then let the chips fall where they may.

Finally, on April 11, 1971, Gillespie sent a congratulatory note [R. - 474] to Frank Turner, El Paso Branch Manager, stating:

> Looks like we may be making our point, El Paso is American Excelsior Territory, with or without distributors. When it is all over, we than can look at patching up our distributor relations. We still prefer distributors but times seem to be changing. Keep the pressure on.

In late March 1971, the amount due from AMXCO to Vebco under the buy-sell arrangement was overdue by $18,000.00. [R. - 240] It was later determined that this was because the Vebco invoices were placed in a "hold file." The "hold file" was a means by which AMXCO

controlled the Vebco account in such a way that it was assured that Vebco invoices were not paid until Vebco's indebtedness to AMXCO was sufficient to be offset — even though none of the Vebco indebtedness was due and payable until June 1971. [R. - 241-243] [PX - 76] [Tr. Vol. III - 1152]

On September 24, 1971, in a continuation of the AMXCO espionage program established with respect to petitioners' operations, June Morris, AMXCO sales manager, wrote a memorandum to the AMXCO president, D. D. Albers, dutifully reporting information concerning the source of Vebco's wood supply. Items covered in the report were 1) the supplier's name, address and phone number, 2) cost of the timber, 3) method of payment, 4) freight cost and 5) quantity contracted for. [R. - 467]

An elaborate scheme was concocted whereby AMXCO would request the contractor to write a letter requesting petitioners to pick up their wood by a certain date or it would be sold to other parties. A copy of the letter was to be made available to AMXCO for its protection in the present lawsuit. After the expiration date the contractor would then write to AMXCO to offer the wood, thus giving the misleading appearance that it had all been the contractor's idea rather than AMXCO's. [R. - 468-469]

This plan did not get off the ground as AMXCO's further contacts with the supplier indicated an excellent relationship between Vebco and the contractor. Nevertheless, it was agreed between AMXCO personnel to attempt to buy the contractor's "total output of wood."

> This would not only relieve the pressure on Englewood and Cedar City to supply wood to Fresno, but it would also deprive Vebco of their present source of wood and possibly make it rather difficult for them to continue their operation. [R. - 471]

The activity could hardly have been more blatant and yet, the trial court ruled the memoranda inadmissible on the grounds of irrelevancy and immateriality.

The court stated at page 1111 of the transcript:

> There was nothing in there — they said — if they don't want the wood, we'll buy it. That's all right . . . it was all above board.

The Court of Appeals stated that the excluded memoranda were "only a minor piece of evidence, highly unlikely to change the result."

After March 1971, when AMXCO had obtained Vebco customers by lowering prices beyond what Vebco could do, AMXCO began to raise its prices. Former Vebco customers, to whom AMXCO offered 32.5% and 39.25% discounts in the 1971 season, were offered discounts of only 25% to 27.1% for the 1972 season which were, nevertheless, lower than the prices offered to buyers other than Vebco's customers. [R. - 67-71]

REASONS FOR GRANTING THE WRIT

1. Sales below cost are not an essential element of proof in making out a Robinson-Patman, Section 2(a) violation.

During the trial of this case no attempt was ever made by petitioners to prove that respondent was selling cooler pads in the El Paso area below its cost. An effort was made, however, to prove that respondent's prices outside the area were well in excess of the prices being charged by respondent in the El Paso area.

A lengthy stipulation was entered between the parties which set out all the prices respondent charged its various customers in other geographic areas upon which petitioners were relying to make out their case of geographic price discrimination as well as the intent to monopolize. However, at the end of the trial just before the stipulation was read to the jury, respondent offered objections to the stipulation and the district court omitted all prices outside the El Paso area.

The Court of Appeals ruled that because there was a general stipulation that respondent's prices outside the El Paso area were different, and because there was other testimony that the prices in the El Paso area were lower, the exact prices were irrelevant and immaterial.

Such a holding completely disregards the fact that the prices being charged in El Paso were the lowest in

the nation and that most of the cities whose pricing was omitted were closer to the respondent's factory than was El Paso and therefore should have been lower, not higher. Additionally without the total price differential being presented, the full impact of the severity of respondent's actions were lost upon the jury.

Furthermore, the Court of Appeals held that "a price differential alone would not show predation; unless AMXCO was selling below marginal cost, it would have no need of aid from other markets and the dollar figures elsewhere would therefore be irrelevant." [App. 26a-27a]

The Court of Appeals [App. 19a] had previously explained that

> . . . even if a monopolist is price discriminating, we will not infer damage to competition as a matter of law if the firm is charging a short-run, profit-maximizing price (above average variable cost) in the market in which it faces competition. And, even if its price is below this level, we will not infer damage to competition if the firm's price discrimination has beneficial effects or insignificant effects in the competitive market. In short, in order to prevail as a matter of law, a plaintiff must at least show that either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry

> are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.

Based upon the Court of Appeals same reasoning vis-a-vis below cost sales, the court held it was unnecessary to construe the "may be" language of the Robinson-Patman Act* and cited *Areeda and Turner, Predatory Practices under Section 2 of the Sherman Act*, 88 *HARV. L. REV.* 697, 727 (1975). In other words the Court of Appeals has ruled that unless there is below cost selling the "incipiency" sections can have no force or effect.

Adoption of the predatory pricing standard enunciated by the Court of Appeals could well spell the end of actions under the Robinson-Patman Act and would certainly discourage private treble damage actions. Such a ruling conflicts with this court's holding in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

Furthermore, this is the first reported opinion wherein such an economic analysis has been used. Such analysis must necessarily have serious adverse precedential effect on future enforcement of the antitrust laws. It conflicts with this court's opinions in *Anheuser-Busch, Inc. v. F.T.C.*, 363 U.S. 536 (1960) and *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

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* ". . . where the effect of such discrimination may be substantially to lessen competition . . ." 15 U.S.C. § 13(a).

2. The evidence of predatory conduct was overwhelming so that the proscribed effect upon competition was proved conclusively.

The Court of Appeals ruled that certain types of predatory conduct on the part of respondent would enable petitioners to show the proscribed effect upon competition to make out a Robinson-Patman, Section 2(a) violation. It then proceeded to examine one action taken by respondent which the court considered the only one to have merit with respect to the predatory intent of respondent.

Carl Gillespie, Division Manager, had written a memorandum to the Division Sales Manager stating a desire to "localize this price struggle as much as possible" and a commitment "to a program of stunting the possible growth of Vebco." [R. - 473]

The Court of Appeals smoothly passed two other items — the tour of the respondent representatives through the Vebco facilities on the pretext that respondent was interested in purchasing the company and the termination of the petitioners' distributorship, both in 1969 and 1971 when petitioner became a competitor.

The Court of Appeals made no mention whatsoever of the following predatory conduct and evidence relating to the predatory intent of respondent:

> (a) The branch manager of the respondent checked the supply of wood of petitioner periodically and on at least one occasion, en-

tered petitioner's plant unannounced and without permission to inspect the facilities and reported his findings to his superiors.

(b) The respondent engaged in a false radio advertising campaign disparaging petitioners' product.

(c) The respondent's price cuts were made only to the customers of petitioners. In no other instances were sales made direct without going through its regular distributors.

(d) Recognition by respondent's management that its price cuts were taking their toll and its low prices would keep petitioners from profiting and lock out of El Paso the one other existing competitor, and statements that "El Paso was American Excelsior territory," "keep the pressure on," that the situation was "war," that petitioners must be hit "hard" or they would become "entrenched," and that AMXCO's "fair share" of the new business was "100%."

Furthermore, because petitioners and respondent had been buying and selling to each other, respondent was presented with an opportunity to exert financial pressure on petitioners by withholding payments of its invoices. Respondent established a "hold file" of petitioners' invoices so that petitioners' cash flow position was hurt. Finally evidence was presented that the supplier of crinoline, a necessary ingredient

to making cooler pads, was informing respondent of prices on crinoline quoted to petitioners and assuring them that it would not lower its price to petitioners. [R. - 465-6]

Additionally the trial court failed to instruct the jury that the proscribed effect upon competition could be inferred from predatory conduct, although requested to do so by petitioners.

Other evidence relating to predatory conduct and intent was kept from the jury by the trial court and will be considered, *infra*.

To hold that the above described conduct is not sufficient to a holding that the requisite substantial adverse effect upon competition may exist creates a conflict between the Fifth Circuit and Fourth and Sixth Circuits. *See Maryland Baking Co. v. F.T.C.*, 243 F.2d 716 (4th Cir. 1957) and *E. B. Muller & Co. v. F.T.C.*, 142 F.2d 511 (6th Cir. 1944).

3. The relevant geographic market is a fact question and is to be ascertained by considering the area in which the competitors actually sold, the areas in which they attempted to sell and the areas into which they might reasonably have been expected to extend their efforts to sell in the reasonably forseeable future.

Although the trial court instructed the jury that the relevant market was where the parties compete, the jury was also instructed that "the relevant market in

this case is the so called El Paso-Las Cruces market for evaporative cooler pads. That is the relevant geographic area involved in this case." [R. - 97]

At every turn the court failed to admit evidence of the respondent's illegal activities outside the El Paso area. Such failures were culminated by the heretofore described omissions of respondent's prices in other areas.

It was clear from the petitioners' pleadings that they alleged an attempted monopoly of the cooler pad market in all of the southwestern states.

Failure to allow evidence of the illegal activity of respondent in those other areas and instructing the jury that as a matter of law the relevant geographic market was El Paso-Las Cruces goes against the well reasoned rule established in both *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) and *Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966) cert. den. 387 U.S. 932 (1967).

4. The means and methods by which a monopolist obtains its market position and its stated predatory intent toward its smaller, less well financed competition may prove the requisite specific intent to attempt to monopolize a particular market.

The Court of Appeals' opinion with respect to the share of the El Paso market held by the parties to this suit is incorrect and not supported by the record. Petitioners' share of and sales in the El Paso market

decreased in 1971 — not increased. Furthermore, AMXCO's sales in El Paso increased from year to year from 1968 through 1971 — contrary to AMXCO's Exhibit D-O. The only way AMXCO was able to give such appearance was by using sales figures that included the entire state of New Mexico as well as El Paso. AMXCO's strongest regional competition was located in northern New Mexico. In reality AMXCO's accounting records relating to El Paso showed an increase each year. [Tr. - 1125, 1126] Vebco's sales in El Paso actually decreased in 1971 by 16%. [R. - 274] AMXCO's Exhibit D-O also contains duplicate AMXCO pad sales in the petitioners' sales figures which causes an overstatement of their market share for each of the years in question. [Tr. - 1118, 1119]

Although AMXCO was the world's largest producer of cooler pads, [R. - 67-71] it had no competition selling in the El Paso-Las Cruces area as late as 1968 and it had in excess of 69% of that market each year for each of the next three years, [R. - 491] petitioners were not allowed to introduce evidence of how that market position was attained.

Robert Case, President of Southwest Industries, upon his deposition testified that American Excelsior had systematically merged with or acquired at least four companies in the cooler pad manufacturing business from the years 1953 to 1968. [R. - 108-125] The court failed to admit evidence of any of the mergers or acquisitions apparently on the ground that it had nothing to do with the lawsuit before it. [R. - 296] But clearly the method by which a defendant attains a dominant position in a market is relevant to an attempted monopoly charge.

Although such acquisitions when considered in and of themselves arguably do not indicate an illegal attainment of monopoly power, when considered with other evidence that AMXCO had negotiated to purchase its largest competitors, petitioners and Southwest Industries, the conclusion is inescapable that such methods were part and parcel of AMXCO's method of keeping or attempting to keep the cooler pad market to itself.

The court admitted evidence relating to the negotiations among the parties to get the petitioners out of the pad manufacturing business but the same type of negotiations between AMXCO and Southwest Industries about which Robert Case had deposed were ruled inadmissible. [R. - 436, 437]

In December 1970, just prior to the AMXCO price cutting activity in El Paso, respondent had broached the possibility of Southwest's selling out to AMXCO. Financial data was turned over to AMXCO and discussions were held between the companies in Arlington, Texas. The negotiations fell through and it was the opinion of Mr. Case that "at that particular time they were more interested in what kind of statement we had, and some sales figures and so forth, more so than they were in talking bout, you know, actually getting together on a merger or a buy out." However, none of this evidence was admitted by the district court, [R. - 108, 125] even though industrial espionage is evidence of predatory intent.

In conjunction with the same type "negotiations" between petitioners and AMXCO it would have established a method of operation reflecting on its intent to monopolize. Because the jury did not have the benefit of knowledge of the Southwest negotiations it could easily have been led to the conclusion that AMXCO's negotiations to get Vebco "out of the pad business" by paying "for some blue sky" [R. - 488] was no more than an innocent attempt to "help out" Vebco.

When AMXCO made the decision to penetrate the southern California market with its cooler pads, there were several large cooler pad manufacturers servicing that particular market area. Rather than compete for the various accounts, AMXCO's approach was to offer the existing manufacturers a price low enough to make it worth their while not to continue to manufacture cooler pads. [R. - 108-125]

Again, the court would not admit the evidence and ruled the stipulation relating to AMXCO prices to those companies irrelevant.

All attempts by the petitioners to extend the factual inquiry at the trial to any area outside of El Paso-Las Cruces were met with similar rulings by the trial court.

The petitioners attempted to admit the deposition testimony of Tom Webb, AMXCO salesman, regarding AMXCO's sales tactics in the Midland-Odessa area but the court sustained the respondent's objection [R. - 320] as being outside El Paso-Las Cruces. The same

was done with the Amarillo area. Every step along the way the court made it abundantly clear that it considered El Paso-Las Cruces as the only relevant location. Further, at one point the court indicated he wanted only evidence of actions by the parties to the lawsuit and involving none other. [R. - 298]

Such an approach ignores the fact that AMXCO's action toward its other competitors may and did directly affect the competitive situation with petitioners and more particularly would have established a course of conduct reflecting directly on its intent to monopolize the cooler pad market throughout the southwestern United States.

To the same effect was the omission of the respondent's attempt to buy petitioners' wood supply. *See* Statement of Facts, *supra*.

Additionally, the trial court, *sua sponte*, refused direct evidence that respondent's intent was to put petitioners out of business.

Mr. Manuel Gomez, a manager of one of the El Paso Feed Mart stores, testified that at one point in March 1971, a representative of AMXCO made a sales call on his store on Montana Street to sell cooler pads. Following is the testimony elicited:

> "Q. Could you tell us the circumstances and what happened at that particular call that you had in 1971, sir?
> "A. My assistant and myself were working at the time, and this representative of American

> Excelsior wanted to talk to us, and then he said he wanted to do business with us, and at that time I told him that we had an authorized source, but I would listen to his offer. I asked him what his prices were, and he quoted a price of less 25 per cent from the listing, and I asked what prices he had on his listing, and I was comparing them with the present sheet that I had from VEBCO. The listing prices were the same. In other words, he was asking — he was quoting us 25 per cent off.
> "Q. The same price?
> "A. Of the same list price.
> "Q. All right, sir.
> "A. Which, in turn, I told him I would have to relate all the information to the buyer.
> "Q. Sir, did you make any comment to him at that time concerning your view of that price?
> "A. Yes, I did. I asked him if he was trying to run VEBCO out of business.
> "Q. Was there any response to that, sir?
> "A. He said, "Yes."
>
> "THE COURT: Disregard that; strike that. That's a voluntary conclusion on his part. He can tell what happened, but —

The trial court stuck to its ruling on the grounds that the respondent salesman could not be identified by name.

Again the Court's excluding such pertinent testimony on intent, and effectively on his own motion, requires reversal of the case.

Nevertheless the Court of Appeals upheld all these rulings by the trial court on the grounds that if error at all, they were harmless and had no effect upon the substantial rights of petitioners.

Such a ruling misapprehends the difficulty of proving the "specific intent" necessary to an attempted monopoly charge and failure to admit all relevant evidence on such an important question conflicts with the rule established in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962); *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. Pullman Co.*, 330 U.S. 806 (1943); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 46, 47, 75 (1911); *United States v. Reading Co.*, 253 U.S. 26, 43-45 (1920).

5. Injury to only one competitor is sufficient to prove a substantial adverse effect upon competition especially when no other competitor could have filled the competitive void created by the destruction of that one competitor.

During the relevant period there were only three competitors in the El Paso area — petitioner, respondent and Southwest Industries ("SWI"). SWI started its business in 1970 and respondent started its manufacturing in 1969. Using AMXCO figures [R. - 491] the market shares were as follows:

	AMXCO	*VEBCO*	*SWI*
1968	100%	0%	0%
1969	77.43%	22.57%	0%
1970	73.27%	23.55%	3.18%
1971	69.05%	26.92%	4.03%

As pointed out previously the Vebco figures included all the AMXCO pads it sold so that the Vebco percentages were overstated considerably. Also the accounting records of AMXCO relating to the El Paso branch sales showed an increase of sales in each of the relevant years while Vebco sales in El Paso dropped 16% in 1971.

Nevertheless the Court of Appeals held that Defendant's Exhibit D-O represented the true picture.

Petitioners have not to this day been able to return to its former level of business in the El Paso area and SWI has lost the only customer that it ever had in El Paso. Yet, because petitioners never closed their manufacturing doors and the court found no predation — only innocent competitive activity — the Court of Appeals ruled that a mere loss of profits and a shift of customers were not enough to prove a substantial adverse effect upon competition.

It is clear, however, that the filing of the present lawsuit in June 1971, conditioned the respondent's activity in the market. Furthermore it continued to sell to the discount stores and national chains (retailers), Vebco's old customers, at prices lower than it offered to its distributors.

To hold that in such a market competition there was no reasonable possibility of competitive injury conflicts with the rule established in *Klor's, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959).

6. Evidence of damage to petitioners occurring during the post complaint period tended to show the adverse effect upon competition and should not have been omitted.

The petitioners filed a supplemental complaint in July 1972, and the trial was held in June 1973.

Paul Britt attempted to testify concerning the 1973 post-complaint market situation and Vebco's sales and margins figures, but the trial court excluded such evidence on its own motion.

Such information should have been admitted to show the lasting effect the anticompetitive activities of respondent had had upon the petitioners and to support the projections of the expert witness relating to damages. Such failure abrogates the rule established in *A. C. Becker Co. v. Gemex Corp.*, 314 F.2d 839 (7th Cir. 1963) cert. den. 375 U.S. 816 (1963) and creates a conflict in the circuits.

7. When there is undisputed evidence that a price cutting, large, national seller is aware of its small, local competitors' prices but nevertheless cuts its prices to only the local competitors' customers by ten percent (10%) the good faith meeting of competition has not been proven. On the contrary such conduct is predatory.

This case is not only a "primary line" Robinson-Patman case as the Court of Appeals suggested but it is also a "secondary line" case in that Vebco was a purchaser of and distributor of AMXCO cooler pads in all the years complained of with the exception of 1972.

The stipulation entered into between the parties shows the widespread disparity between the prices of the AMXCO cooler pads both in other southwestern states and in the El Paso area. No attempt was made by AMXCO to prove that any of the disparities were in existence because of any "good faith meeting of competition" with the exception of those of the 1971 season. Even then no effort was ever made to justify the discrimination between the independent distributors and the retail discount trade.

It was AMXCO's theory that the relevant market was the discount trade in El Paso-Las Cruces, that no prices outside that area were relevant and even the discriminatory prices offered to the various classes of trade in El Paso-Las Cruces were not relevant. [R. - 449-56]

With that background, nevertheless, AMXCO's personnel did testify with respect to their price cutting activities in 1971 and attempted to justify it for business reasons other than the "good faith" meeting of competition.

They testified that the factors relevant to their setting cooler pad prices were 1) quantity purchased, 2) from where they are delivered (local warehouse or factory), 3) the existing "competitive situation" and 4) the

class of trade the customer serves. [R. - 336, 378-379, 421] It was developed that the "competitive situation" was no more than what it takes to get the business in a given locale.

AMXCO personnel also testified it was Vebco who made the first illegal price cut. Although in January 1971, Vebco dropped its prices to a discount of 14.5% off list price, such price was not below the AMXCO price being offered at the time. Prior to that date and for a short time thereafter AMXCO sold its cooler pads only to independent distributors, and some chain stores such as Sears. The record shows conclusively that AMXCO's price to its primary independent distributor in El Paso, Passage Supply, was 23% below the list price. [R. - 69] Only one distributor, R.S.I., in the El Paso area received a higher price from AMXCO than the 14.5% discount price Vebco was offering, and that distributor received only a 10% discount apparently because it only purchased approximately seven percent of the dollar volume that Passage Supply purchased. AMXCO's price to Sears was 19% off the list price. Even if it was not AMXCO who made the price cut in January 1971, nevertheless, AMXCO did initiate the illegal price cutting in March 1971. Furthermore the offer of the 14.5% discount by Vebco to K-Mart was made long before Passage Supply called on K-Mart in 1971 and could not be construed to be cutting Passage's price even if K-Mart were to be considered AMXCO's customer. The first illegal price cutting in the El Paso market occurred on March 2, 1971 by AMXCO when knowing from its own distributor, Passage Supply, [R. - 327] what price it would take to beat (not meet) Vebco's price, it reduced

its price 10% below Vebco's prices and required no volume purchases to obtain that price.

Furthermore it is clear from the record that at least some of the AMXCO personnel knew exactly what was going on. Immediately after the initial price offer of a 25% discount, Paul Britt wrote AMXCO's Pico Rivera division manager to thank June Morris for "the lesson in salesmanship (find out what the competition is and cut the price 10%)." [R. - 463] The owner of AMXCO's largest independent distributor told them it would take "three fives" off to get the K-Mart business. [R. - 308] After AMXCO began selling direct, Paul Britt told both AMXCO's salesman and branch manager that Vebco would meet AMXCO's price cuts and that Vebco would retain the business [R. - 233, 237, 237]. Every discount store buyer except one testified that the AMXCO people knew what Vebco's price was and Vebco was merely meeting each subsequent cut of AMXCO's. Furthermore, even the division manager, Gillespie, testified that Turner and Paul Britt had told him on many occasions that the El Paso discount trade were customers of Vebco. [R. - 432-33]

Not only was it made undisputedly clear that AMXCO was not in "good faith" in its price reduction but it never merely met "an equally low price" of a competitor which is a prerequisite to relying on the good faith defense. Nevertheless the Court of Appeals held the "good faith meeting of competition" defense was proved. Such a holding is adverse to this court's opinion in *A. E. Staley Mfg. Co. v. F.T.C.*, 324 U.S. 746 (1945).

8. The reason respondent received a jury verdict was the attitude expressed by the court

toward certain evidence presented by petitioners as well as the court's failure to allow the expansion of the case to its proper limits.

The district court's participation in the trial of the case was in marked contrast to his pretrial participation and his bland instructions to the jury with regard to the evidence. Clearly the court's comments on particular items of evidence sought to be introduced by petitioners, his numerous admonitions to "move on" and "not" to "get into that" as well as his objections *sua sponte* to various attempts by petitioners to develop certain evidence were an abuse of discretion, prejudiced the petitioners' case and require reversal.

During the course of the trial the judge interrupted the questioning by the attorneys no less than one hundred eighty-seven times. [R. - 131] These interruptions were gratuitous in that the opposing counsel had not first objected to the proceedings or what was being said at the time.

Of those one hundred eighty-seven interruptions, one hundred fifty-one were at times when counsel for the petitioners was interrogating the witnesses. Only nine of the total interruptions worked even conceivably to the detriment of the respondent.

The court's exclusion of competent evidence tending to prove the petitioners' charges are complained of and argued in other sections and will not be repeated except to say that of all those exclusions, 1) mergers and acquisitions, 2) the negotiations to purchase

Southwest Industries, 3) activity in other areas, and 4) the penetration of the southern California market were first objected to by the district court who was then followed by AMXCO's objections on some of the questions.

One of the most exasperating aspects of trial of the case was the repetitive comments of the court that certain testimony had "nothing to do with it" or "I don't think that's material." Examples of the evidence and comments thereon by the court are many. Throughout the trial as stated elsewhere, petitioners attempted to prove the specific intent to monopolize. Such proof necessarily required a wide range of evidence relating to the many facets of AMXCO's activities. Nevertheless at one point when counsel for petitioners was attempting to delve into AMXCO's receipt of information from a crinoline supplier regarding Vebco's orders of crinoline (a necessary ingredient to make a cooler pad), the following took place:

"Q Are you telling me it is a normal situation for one of your suppliers to tell you what price they're going to charge one of your competitors?

"A Not normally, no; that is not normal.

"Q Okay. Now, there's a last paragraph there that says, 'Kendall has promised to advise me if they do in fact receive an order from VEBCO, and I will keep you informed'

"THE COURT: What is wrong with that: They've been dealing with these people for 20

years, and undoubtedly have a close relationship. We're not going into all of these different things as to the quantity he buys or the other circumstances. They're entitled to this — this other company is not involved in this lawsuit.

"MR. KING: VEBCO and American Excelsior are competitors, Your Honor.

"THE COURT: That may be, but you have just now come into this, and he said for 20 years they've been dealing with this Company. We're not going to try two or three different lawsuits in here. I think it speaks for itself. I'll let that in, but we're not going to try two or three different lawsuits." [R. - 314]

And at another point involving the same exhibits [R. - 465, 466] the following:

> "THE COURT: Why are we putting so much in on that? They're not part of this lawsuit. What's the significance of it?
>
> "MR. KING: Your Honor, the significance is that everybody that VEBCO had to get supplies from, these people, American Excelsior were in contact with them.
>
> "THE COURT: That doesn't prove anything. You'll have to get something here — don't take up our time unless you can get down to it. I don't see anything yet except we're wasting a lot of time.

> "MR. DERRICK: There's no evidence that we contacted them. They contacted us.
>
> "THE COURT: You'll have to show me something here that ties it in. This doesn't tie anything in. They notified them, and I don't see any harm in these matters here. [Tr. Vol. II - 509-10]

If the court could see no "harm in these matters," the jury would be hard pressed to believe any argument made by petitioners' counsel.

And on numerous occasions AMXCO personnel checked the Vebco premises to determine the level of their wood supply. An AMXCO witness testified such practice was not unusual. "Our competition comes around and checks our wood pile all the time." When petitioners' counsel asked him to recite specific incidences he had seen, the court stated "I think this is probably immaterial . . . I don't see any difference whether Vebco checked their wood pile or didn't check their wood pile . . . I don't see the materiality of that, seeing what other businesses are doing." The witness could think of no instances that the competition had checked the AMXCO wood supply. [R. - 333]

There are other instances relating to the court's failure to admit evidence of AMXCO's poor local management [R. - 426], the freight rate that AMXCO paid on its pad shipments [R. - 419] and the policies of AMXCO as known by the various AMXCO witnesses.

Each of these inquiries were relevant but were made to appear by the court as totally without merit even though AMXCO testimony was admitted claiming AMXCO's freight rate was lower than Vebco's, AMXCO's loss of business over the years was attributable only to the competition and it was unclear what the AMXCO pricing policies were.

Prior to trial petitioners had prepared several large exhibits to portray graphically not only the actions of AMXCO but the effects of those actions. Each time petitioner's witnesses began to testify the court interrupted and jumped from one point to another, thus creating chaos and complete confusion.

As is true with so many of the errors cited herein in respect of the court's participation, the record must be read *in toto* to grasp the full significance. A prime example, however, was the attempt to admit testimony concerning the facts summarized on Plaintiffs' Exhibit 19. [Tr. Vol. II - 137-154] This exhibit, as were several others, was prepared in accordance with the recommendation in the *Manual For Complex Litigation* that, "voluminous or complicated data of an admissible character should be presented whenever possible through written or oral summaries, tabulations, charts, graphs or extracts." Id. §2.611 at 27.

The court apparently disagreed with this principle and objective in that he stated to the jury on several occasions, and so instructed them, that "the jury understands this isn't evidence, it's merely convenience; the evidence it's taken from will have to be available." [R. - 248] [R. - 346-351] [R. - 98]

When the court took over the questioning relating to the exhibit the matter became hopelessly confused. The court finally reached the conclusion that the presentation of PX 19 was premature and other witnesses should have been called first even though the witness, Paul Britt, had made the summary on the exhibit from the books and records. The witness was passed and was recalled at a later time.

During the course of the trial several witnesses were called out of order for the convenience of the respondent when actual or potential witnesses were not going to be available at the appropriate times. One such witness was petitioners' expert, Mr. Albert R. Cox, a certified public accountant.

After the initial questioning by counsel, on its own motion the court interrupted to ask the meaning of the questioning, then minutes later the court took over the questioning altogether. [R. - 353] The court's questioning lasted for the next fifteen pages in the record. Although the court purportedly was trying to "simplify it" [R. - 354] "so the jury will know what you're doing" [R. - 355], it is clear from reading the record it was not simplified by the court's jumping from point to point and not allowing counsel to question the witness.

Initially the expert's testimony had been expected to be relatively simple and the report which was submitted to opposing counsel and filed of record was quite thorough as the court stated. [R. - 356] However, once the court began to question the witness, clarity vanished completely because there was no organiza-

tion to the presentation of the material. There is absolutely no way that the jury could have understood it. Even with the benefit of the printed word the portion of the record relating to this testimony is unclear.

Finally the court ordered that the witness read the report to the jury which had been filed and some semblance of order in the presentation was restored. However, the damage had been done.

Clearly this type of conduct by the trial court is prohibited as violating petitioners' right to trial by jury.

CONCLUSION

For the foregoing reasons the Petition for the Writ of Certiorari ought to be granted.

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioners, INTERNATIONAL AIR INDUSTRIES, INC. and VEBCO, INC., hereby certifies as follows:

(a) that I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown;

(b) that the names and addresses of the attorneys of record for the adverse party are as follows:

William J. Derrick and Royal Furgeson,
P. O. Drawer 2800, El Paso, Texas 79999;
attorneys for American Excelsior Company

(c) that on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said William J. Derrick and Royal Furgeson, attorneys for Respondent, by depositing same in the United States post office with air mail postage prepaid, properly addressed to said attorneys for Respondent at their said address.

EXECUTED this the ____ day of January, 1976.

Attorney for Petitioners

APPENDIX A

INTERNATIONAL AIR INDUSTRIES, INC. and Vebco, Inc., Plaintiffs-Appellants,

v.

AMERICAN EXCELSIOR COMPANY, Defendant-Appellee.

No. 74-1953.

United States Court of Appeals, Fifth Circuit.

Aug. 18, 1975.

Kenneth L. King, El Paso, Tex., for plaintiffs-appellants.

W. Royal Furgeson, Jr., William J. Derrick, El Paso, Tex., for defendant-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, GODBOLD and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Appellants Vebco, Inc., and International Air In-

dustries, Inc.,[1] filed a complaint in the United States District Court for the Western District of Texas charging AMXCO, Inc.,[2] with a violation of the antitrust laws. A lengthy, complex and seemingly disorganized jury trial was held, resulting in a verdict in AMXCO's favor. Vebco appeals, alleging at least twenty substantive trial errors. We affirm the judgment below.

I.

The facts in this case are heatedly contested. Since the trial below resulted in AMXCO's favor, we consider the facts in a light most favorable to it.

Vebco, Inc., is a New Mexico corporation with its principal place of business in El Paso, Texas. It was incorporated in 1959. Vebco is primarily a distributor of heating and air conditioning equipment, although it does manufacture some products, including handmade evaporative cooler pads. It sells its pads primarily in Arizona, New Mexico, and West Texas.[3]

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1 Although Vebco and International were nominally separate business entities, they operated as one business. Because of the interrelation of the two corporations, they had only one counsel and were treated as one entity for purposes of trial. Therefore, "Vebco" will hereinafter refer to both plaintiffs, unless otherwise indicated.

2 American Excelsior Company was the named defendant in the district court, but during the course of discovery Vebco realized that AMXCO, Inc. was the corporate successor to that company. The defendant-appellant will therefore hereinafter be referred to as "AMXCO".

3 International Air Industries, Inc., was incorporated in 1969 for the purpose of manufacturing evaporative cooler pads and evaporative cooler covers for sale by Vebco. Vebco and International, although separate corporate entities, operated as one business. International ceased operations in 1972 and Vebco took over the manufacturing operation.

AMXCO, a subsidiary of Texstar Company, has its principal place of business in Arlington, Texas. It maintains a branch office in El Paso, Texas, and manufactures evaporative cooler pads which it sells throughout the southwestern and far western parts of the United States.

The source of the controversy in this case is the cooler pad, an object made of aspen wood shavings covered with crinoline cloth, used in evaporative air conditioners. Such pads have historically been made by hand, but around 1960 AMXCO achieved a breakthrough in the field and began to produce a machine-made pad. Hand- and machine-made pads are interchangeable in use, but the latter can be produced, transported, and stored more cheaply. Through its technological success and business expansion AMXCO became the world's largest producer of cooler pads.

Vebco and AMXCO have enjoyed a lengthy business relationship. The founder of Vebco, Vernon Britt, began to distribute pads for AMXCO in 1953. Until 1969, with only one short exception, the only pads Vebco distributed were manufactured by AMXCO. By selling AMXCO's pads, Vebco developed a highly successful business and gradually expanded its operations to include a complete line of heating and cooling implements.

Except for direct sales to "national accounts," AMXCO marketed all of its cooler pads through independent distributors such as Vebco. Vebco's primary customers in the El Paso-Las Cruces trade area were

discount stores. The only large discount store in the area to which Vebco did not sell cooler pads was K-mart, serviced by Passage Supply, an independent distributor for AMXCO.

Prior to 1969, AMXCO favored its El Paso distributors over its Arizona distributors in freight policy: AMXCO paid freight costs of its El Paso distributors to their customers in Arizona but did not pay the freight costs of distributors in Arizona to their customers in El Paso and Las Cruces. In order to rectify this competitive inequity, AMXCO decided to eliminate the freight pre-payment for its El Paso distributors. When AMXCO adopted a uniform freight policy: AMXCO paid freight costs of its El Paso displant for cooler pads. With the aid of three former employees of AMXCO, the owners of Vebco formed a corporation and built a plant to manufacture cooler pads by hand in 1969. Vebco then entered the market as a manufacturer and successfully competed with AMXCO. Later that same year, Southwest Industries was formed. Like AMXCO, Southwest manufactured and marketed machine-made cooler pads. There were also numerous small scale handmade pad manufacturers in the market.

When AMXCO learned that Vebco was manufacturing its own cooler pads, AMXCO terminated its distribution relationship with Vebco. Although it lost customers to Vebco in 1969, AMXCO took no action in regard to price.

In 1970, Vebco expressed considerable concern to AMXCO at the emergence of Southwest as a competitor, particularly since partners in the Vebco

manufacturing operation were officers of Southwest. Vebco even tried to induce AMXCO to purchase Vebco or its manufacturing operation. AMXCO agreed to loan the Vebco owners $20,000 to buy out the Vebco principals then involved in Southwest and to pay off Vebco's outstanding indebtedness. The negotiations to purchase Vebco never reached fruition but an agreement was reached whereby AMXCO sold specially packaged pads to Vebco which were offered for sale under Vebco's label, and Vebco sold pumps and parts to AMXCO.

Because the 1970 agreement was profitable for both parties, they agreed to continue the operation in 1971. However, prior to the 1971 selling season, relations between the two companies deteriorated, resulting in the suit before us.

In late January, 1971 Vebco dropped its price to discount houses 5% below the price currently being quoted by both AMXCO and Vebco[4] — to a 14.5% discount below list price. This price cut brought Vebco considerable business, including the very lucrative K-mart account which had previously been serviced by AMXCO's distributor, Passage Supply. The record indicates that AMXCO's distributors complained that they could not effectively compete with Vebco, because the latter manufactured its own pads for distribution.

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4 Vebco alleged at trial that it was actually meeting a price which had been quoted by either AMXCO or one of its independent distributors. However, Vebco did not attempt to verify the allegation that AMXCO was offering a lower price and there is no evidence in the record, other than Vebco's allegation, that AMXCO initiated the price cutting.

On March 1, 1971, AMXCO requested Vebco's order for three carloads of pads which Vebco had indicated it would purchase from AMXCO. When Vebco failed to verify its order, AMXCO determined that customers which had previously used AMXCO pads distributed by Vebco would now be serviced by Vebco's own pads. In effect, Vebco was going to compete against AMXCO for its customers rather than distributing its pads. AMXCO then decided to compete directly for the discount trade in the El Paso area.

Based on previous public bids by Vebco and Southwest, and on information received from customers, AMXCO determined that a 25% discount would be competitive in the market. AMXCO then contacted its old customer, K-mart, and at least one other discount house, offering the 25% discount. However, AMXCO salesmen made no sales at the 25% discount, because, unknown to them, Vebco had verified their price and had notified its customers that it, too, would give the 25% discount. Because of the lack of sales at the 25% discount, and because at least one potential customer had reported that Vebco was selling at near a 50% discount, AMXCO again lowered its price, offering a 32.5% discount. Again, Vebco verified and met this price on March 15, 1971, and AMXCO made no substantial sales.

During this intense period of competition, AMXCO delegated price-setting responsibility in the El Paso market to two of its local employees, Wendell Johnson and June Morris. Carl Gillespie, AMXCO's division manager, continued to make recommendations, and on March 16, 1971, he prepared a memorandum suggesting ways to compete with Vebco and

Southwest, which included, as one possible alternative, the option of offering prices in El Paso low enough to insure that Vebco would not profit from competitive sales. On March 17, Gillespie also wrote Morris a letter which contained the statement:

> [I]f we are committed to a program of stunting the possible growth of Vebco and keeping our foot in this quite seizeable cooler pad market, then the real question we have here is just what price do we need to determine as our lowest price level.

Vebco had a great deal of difficulty sustaining a 32.5% discount and on March 29, 1971, Vebco announced to its customers that it would return to the 25% discount. AMXCO subsequently made one sale to K-mart, its prior customer at a 39% discount. After the 1971 season, AMXCO raised its prices, offering discounts from 19 to 25% for the 1972 season.

On May 28, 1971, Vebco initiated this suit, charging AMXCO with a violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. (15 U.S.C. § 13(a)).[5] The complaint was amended on July

5 15 U.S.C. § 13(a) provides in relevant part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . .

28, 1972, to charge, additionally, a violation of § 2 of the Sherman Act (15 U.S.C. § 2).[6] The gravamen of the complaint is that AMXCO unlawfully discriminated in price from 1968 through 1971 and attempted to monopolize the El Paso-Las Cruces cooler pad market, as well as that of the southwestern United States, during the same period. Vebco subsequently supplemented its complaint to include the 1972 cooler pad season.

Vebco alleged damages totaling over $100,000 for the years prior to and including 1971 and $42,000 for 1972. It sought treble damages as provided under the antitrust laws, as well as an injunction against AMXCO's allegedly unlawful behavior.

The record indicates that the dollar value of Vebco's cooler pad sales has increased every year sinc 1968, with the exception of a slight decline in 1972.[7] Conversely, AMXCO's share of the national cooler pad market has declined steadily since 1969. Vebco conceded at trial that it claimed only lost profits, presumably from keen price competition, rather than lost sales for the years prior to 1971. Indeed, almost all of the allegedly illegal acts of which Vebco complains

6 15 U.S.C. § 2 (1973) provides:
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

7 Vebco's share of the El Paso cooler pad market also showed a steady increase from 1968 through 1971, the only years for which market figure percentages were introduced below.

occurred immediately prior to, or coincidental with, the 1971 cooler pad season. During this season, some of the firms with which Vebco previously dealt purchased pads from AMXCO. Nevertheless, Vebco's cooler pads sales, measured in dollars, and its percentage of the El Paso cooler pad market increased in 1971;[8] indeed, only Vebco's markup on pads decreased.[9]

With respect to the slight decrease in 1972 cooler pad sales, Vebco's president conceded at trial that the decline could easily have been caused by the firm's efforts to improve its manufacturing operation at the expense of its sales program. Likewise, the record reveals that 1972 was a poor season for all cooler pad manufacturers and distributors because of inclement weather.

All in all, the record before us reveals that since 1968, the cooler pad market in El Paso has been extremely competitive. The sales season for cooler pads is quite short and manufacturers must necessarily process orders early. On the other hand, the record indicates that customers intentionally quote lower prices to distributors and manufacturers than have actually been offered by a competitor in the hopes of securing a lucrative offer. Vebco, AMXCO, Southwest, and one other manufacturer continue to vigorously compete in the El Paso market.

8 Vebco kept no separate sales figures for cooler pads prior to the initiation of this law suit. The dollar sales figures cited herein are their estimates of past sales based on a review of their invoices.

9 Vebco's markup percentage or "gross margin" (retail price minus the cost divided by the retail price) for cooler pads in the years 1968 through 1972 inclusive, was 12%, 17%, 22%, 13%, and 18% respectively.

II.

Vebco's primary argument on appeal is that the district court erred in refusing to direct a verdict in Vebco's favor on the Robinson-Patman charge.[10] The district court should grant a motion for a directed verdict only if, considering all the evidence and all reasonable inferences that can be drawn from the evidence in a light most favorable to the non-mover's case, reasonable men could not arrive at a verdict in favor of the non-mover. *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). Applying this standard to the case before us, we find that the trial court was correct in refusing to direct a verdict in Vebco's favor.

Section 2(a) prohibits price discrimination between different purchasers of commodities of like grade and quality "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure,

10 Vebco argues on appeal that while the district court erred in not directing a verdict on the Robinson-Patman claim, its disposition of the Sherman Act count was correct, for the record would not support a directed verdict as to the latter. Such an argument surprises us, for we believe that the basic substantive issues raised by the two statutes (with respect to the primary-line injury in the case of the Robinson-Patman Act) are identical. Vebco's counsel apparently feels that the conditional language of the Robinson-Patman Act ("where the effect of such discrimination *may be* substantially to lessen competition" (emphasis supplied)) implies a lesser evidentiary burden on the plaintiff than is required under the Sherman Act. Under the Robinson-Patman Act, of course, it is not necessary to show actual damage to competition, it is only necessary to show that there is a reasonable possibility that the discrimination may have that effect. *See Corn Products Refining Co. v. FTC*, 324 U.S. 726, 65 S.Ct. 961, 89 L.Ed. 1320 (1945). However, since AMXCO's activities cannot reasonably be viewed as a lessening of competition (see text accompanying notes 21-34 *infra*), then construing the "may be" language is not necessary, *see* Areeda and Turner, Predatory Practices under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697, 727 (1975); *Anheuser-Busch v. FTC*, 289 F.2d 835, 843-44 (7th Cir. 1961).

destroy, or prevent competition."[11] The Act was primarily aimed at national chains that enter a locality and crush a more efficient local concern by cutting prices below cost and subsidizing local losses with excessive profits gleaned in a non-competitive area. *See* F. Rowe, Price Discrimination under the Robinson-Patman Act 123 (1962). However, Congress did not intend to abolish competition "or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor." *Standard Oil Company v. FTC*, 340 U.S. 231, 249, 71 S.Ct. 240, 249, 95 L.Ed. 239 (1951). Thus our goal in applying the Robinson-Patman Act is to maintain active competition — including price rivalry — among the members of the business community.

Encouraging competition while at the same time forbidding anti-competitive behavior calls for considerable care in this case. The facts before us reveal a large entrenched firm with a dominant market share confronted by a fledgling company attempting to enter the same market. Such a situation necessitates the greatest scrutiny on our part, for anti-competitive price cuts by the monopolist could be directed toward driving the new competitor out of the market or disciplining it in order to force it to follow the monopolist's price leadership. On the other hand, we believe that neither the Act nor any social value compels the sheltering of an individual competitor, at the

11 The Act is concerned with competitive injury to three groups: competitors of the price discriminator ("primary line"), customers of the price discriminator ("secondary line"), customers of the price discriminator's customers ("tertiary line"). Only a primary line injury is alleged in this case, and our comments and conclusions therefore pertain only to such injury.

expense of the public interest, from the competitive process. *See* F. Rowe, *supra*, at 130.

Vebco claims that AMXCO violated the Act when it sold cooler pads to El Paso customers at prices lower than it sold its pads elsewhere. A price discrimination within the meaning of the Act, of course, is merely a price difference, *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549, 80 S.Ct. 1267, 4 L.Ed.2d 1385 (1960), but price discrimination is not illegal per se, Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97, 103 (10th Cir. 1973). In order to meet the requirement of an adverse effect upon competition, Vebco claimed that there was considerable diversion of business from Vebco to AMXCO in 1971, and, additionally, that Vebco suffered a reduction in its profit margin because it had to compete with AMXCO.

It is settled law that a mere diversion of business from one competitor to another does not signify detriment to competition on the seller level.[12]

> The Act is really referring to the effect upon competition and not merely upon competitors. In

12 *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961); *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 790 (7th Cir. 1951). *See also*, Dixon, *Practice and Procedure Before the Federal Trade Commission*, 9 N.Y.L.F. 31, 36 (1963): "Thousands of firms go into bankruptcy every year without bringing a single tear to the eye of anyone even remotely connected with antitrust enforcement. Where a businessman perishes because of his own inefficiency, i. e., because of his inability to make as good a product, sell it at as low a price, or promote it as effectively as his competitors, his passing is noted without a tremor. Indeed, this is normally a sign that the industry in which he failed is a healthy one in which competition is vigorous enough to weed out marginal operators whose talents and resources should be employed elsewhere."

> this respect § 2(a) must be read in conformity with the public policy of preserving competition, but it is not concerned with mere shifts of business between competitors. It is concerned with substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses. . . . Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 840 (7th Cir. [1961] 1971) (citations omitted). See *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 954 (10th Cir. 1959) *cert. denied*, 363 U.S. 843, [80 S.Ct. 1608, 4 L.Ed.2d 1727] (1960); F. Rowe, *supra*, at 122-23.

Mere loss of profits shows no more than that Vebco was forced to charge a competitive price because it faced competition. Similarly, the large size of the discriminator and even the fact that its sales increased during the period of discrimination would not necessarily make out a case.[13] *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 839, 843 (7th Cir. 1961). It is possible for damage to a single competitor to meet the statutory requirements, *see Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967), but a showing of more than competitive pricing and a shift of customers is necessary. Evi-

13 We do not intimate that all of these criteria necessarily apply to the case before us. For example, the record shows that AMXCO's percentage of the market declined during the relevant period.

dence of certain types of predatory conduct, we feel, would fulfill the requirements.[14]

Coupled with its claims of lost profits and diversion of business, Vebco introduced evidence purporting to show AMXCO's "predatory intent" in order to satisfy the statutory requirements. Of the actions which Vebco alleges evinced AMXCO's predatory intent, the only one meriting extensive comment is the Gillespie memo of March 17, 1971, which Vebco claims was conclusive proof of AMXCO's predatory intent.[15]

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14 Antitrust cases and literature have indicated that the necessary primary line damage to the competition may be found in the absence of predation if certain none too clearly defined conditions result from the price discrimination. *See Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97 (10th Cir. 1973); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960); F. Rowe, *supra* at 150-161. We find it difficult to discern the manner by which a firm's legitimately competitive behavior absent acquisition of monopoly power could cause damage to competition. However, we need not address that issue. AMXCO's share of the El Paso cooler pad market declined throughout the relevant period; the market was far more competitive after the discrimination than before it; and Vebco, Southwestern and one other manufacturer continue to exist and even grow as large competitors of AMXCO. These facts indicate that even under those cases finding a violation of the statute in the absence of predation, the requisite damage to competition is not present. *See Continental Baking Co. v. Old Homestead Bread Co., supra; Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967); F. Rowe *supra* at 160-161 and cases cited therein. Consequently, Vebco necessarily rests its case upon a "predatory intent" argument.

15 Among the other actions which Vebco claims evinced AMXCO's predatory intent was AMXCO's negotiation to purchase Vebco. Even if we assumed that negotiation to purchase a less efficient competitor is in some circumstances anti-competitive, the record clearly shows that Vebco initiated the negotiations and that AMXCO refused to purchase Vebco. Vebco also contends that AMXCO's decision to discontinue supplying Vebco in 1969 was further evidence of predatory intent. However, at oral argument Vebco's counsel conceded that AMXCO had a legitimate right to terminate its relationship with Vebco because Vebco began to manufacture its own pads in 1969 and therefore operated as AMXCO's competitor.

Judicial use of the term "predatory intent" is troublesome. Several cases hold that from a finding of certain actions, the trier of fact may infer predatory intent, and from this inference the proscribed inimical effects upon competition in turn may be inferred.[16] However, application of these principles is particularly difficult, for predatory intent has never been clearly defined. Its appearance has been characterized by phrases such as "putting a crimp" into one's competitors,[17] punitively or destructively attacking other firms,[18] and acting vindictively with punitive effect.[19] But any price decrease by a legitimately competitive firm will necessarily have a non-remunerative effect upon other firms in the market, if only by decreasing their profit margins. It is therefore important to clearly indicate the types of business behavior which violate the Act.

In this appeal Vebco seeks a ruling that no reasonable man could fail to believe that AMXCO violated the statute. Vebco's allegations of predatory intent were contested at trial by AMXCO. Therefore, even under the unwieldly "double inference test," Vebco cannot prevail on appeal; the record indicates that the jury would have been justified in finding an absence of "predatory intent," or, upon finding such intent, in failing to draw the permissible inference of damage to competition.

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16 *See Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696, n. 12, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967); *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97, 104 (10th Cir. 1973); *Cornwell Quality Tools Co. v. C. T. S. Co.*, 446 F.2d 825, 831 (9th Cir. 1971); *Lloyd A. Fry Roofing Co. v. FTC*, 371 F.2d 277 (7th Cir. 1966).

17 *E. B. Muller & Co. v. FTC*, 142 F.2d 511, 517 (6th Cir. 1944).

18 F. Rowe *supra* at 149.

19 *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 842 (7th Cir. 1961).

It is possible, of course, for a plaintiff to present evidence of predation sufficient to warrant a directed verdict, but quoting out of context segments of internal company memoranda is simply insufficient. Gillespie's memorandum reveals that AMXCO acted as any legitimately competitive and rational firm would; Gillespie considered Vebco's potential for growth and enumerated several alternatives which AMXCO officials could consider in meeting the new competitive challenge. In order to require a court to direct a verdict, Vebco must adduce evidence of what AMXCO did; at best, it showed only what AMXCO might have done. *See Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 843 (7th Cir. 1961).

Since the allegedly harmful actions in this case involve pricing, we must examine the relationship between AMXCO's prices and costs in order to determine whether their price behavior was predatory.[20] By "predatory" we mean that AMXCO must have at least sacrificed present revenues for the purpose of driving Vebco out of the market with the hope of recouping the losses through subsequent higher prices.

When a firm sets its price equal to its average cost, its total revenues cover total costs, including normal returns on investment.[21] If a monopolist[22] is selling at

20 We therefore do not consider other conceivably predatory behavior such as predatory investment or promotional spending.

21 *See* Areeda and Turner, *supra* note 10 at 704; P. Samuelson, Economics 447-48 (8th ed. 1970). Much of our discussion in the next few paragraphs is based upon accepted economic analysis. *See e. g.*, P. Samuelson, *supra* at 428-510.

a price at or above average cost, but could earn higher profits at a higher price, it may be attempting to deter entry into the field. Likewise a monopolist may attempt to drive out existing competition by temporarily lowering price to average cost. In either case, we believe that a price above average cost is a fairly competitive price for it is profitable to the monopolist if not to its rivals; in effect, the price excludes only less efficient firms. Areeda and Turner, *supra* note 10, at 706-707.

In the case before us, the entry of Vebco and Southwest created excess manufacturing capacity in the cooler pad market.[23] Therefore, AMXCO's marginal cost was almost certainly below it average cost.[24] In such situations we do not believe that the monopolist's pricing behavior could be deemed anti-competitive unless the monopolist set a price below its own marginal cost — since any sale at or above

22 For the purposes of this discussion a monopolist is one who has captured a sufficiently large part of a market to be able to determine market price by varying its output. *See, e. g., Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 667 (9th Cir. 1963). We do not use the term to indicate that the firm is a monopolist under the language of the Sherman Act and hence violating the law by its very existence.

23 The record shows that Vebco and Southwest both built factories during the years at issue in this suit. The fact that this new production created excess capacity is also evidenced by an AMXCO memorandum which indicated that every sale Vebco made increased AMXCO's unit costs by idling some of its production facilities.

24 *Id.* at 710. If AMXCO's production facilities had been producing beyond the output at which they function most efficiently, AMXCO's marginal costs, the cost of the last unit produced, would exceed its average cost. In such a situation, a reduction of price to marginal cost would still cover all of the company's expenses (fixed as well as variable), and equally efficient competitors would make substantial profits by restricting their output to efficient levels. *See* Areeda and Turner, *supra* note 10 at 709-710.

marginal cost does not decrease short-run net returns.[25] It may be theoretically possible for a reduction of price to marginal cost by a monopolist to drive out an equally but not more efficient competitor. *Id.* at 711. However, establishing a price floor above marginal cost would permit the survival of far less efficient firms. Certainly, forcing a monopolist to charge a price higher than marginal cost could reduce industry output and waste economic resources in the short-run.[26]

It is frequently quite difficult to calculate the incremental cost of making and selling the last unit (i.e., marginal cost) from a conventional business account. *Id.* at 716. Consequently, the firm's average variable cost[27] may be effectively substituted for marginal cost in predatory pricing analysis. *Id.* at 717-18. Thus, a firm's pricing behavior can be considered anti-competitive when it sells at a price below its average variable cost.[28]

When price discrimination exists — as in the case before us — we see no reason to depart from the

25 If AMXCO set its price below average cost yet above marginal cost, it might not be profit maximizing. However, prohibiting such behavior could have undesirable effects, for it may not be possible to make a long run profit in the market and a price equal to marginal cost would be loss-minimizing.

26 There would also be insurmountable problems in the enforcement of a prohibition against marginal cost pricing. *Id.*

27 Average variable cost is the costs that vary with changes in output divided by the output.

28 It is conceivable that marginal cost would exceed average variable cost when a firm's output nears its optimum. When this is the case, using the latter as a surrogate for the former enables a firm to sell below marginal cost. However, this exception is justified because when the firm's capacity is strained, predation is especially unlikely. *See id.* at 718.

average variable cost test for predation unless it can be shown that there are significant barriers of entry into the relevant market. Thus, even if a monopolist is price discriminating, we will not infer damage to competition as a matter of law if the firm is charging a short-run, profit-maximizing price (above average variable cost) in the market in which it faces competition. And, even if its price is below this level, we will not infer damage to competition if the firm's price discrimination has beneficial effects or insignificant effects in the competitive market.[29] In short, in order to prevail as a matter of law,[30] a plaintiff must at least show that either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.[31]

29 Since AMXCO has considerable market power we need not deal with various pro-competitive justifications, such as promotional pricing, that a firm with considerably less market power might reasonably employ when charging a price below average variable cost.

30 Much of what we say here should be relevant to the requisite elements of a prima facie Robinson-Patman case. Indeed, in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696, n. 12, 702, n. 14, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967) the Supreme Court indicated that price below "cost" is perhaps, a necessary element of a prima facie case. However, because the Court repeatedly referred to "deteriorating price structure," the opinion may hold that it is not necessary to show a price below marginal cost in order to make out a prima facie case. To the extent that the opinion stands for the latter proposition, we limit our discussion to the elements necessary to sustain a motion for directed verdict.

31 We employ the profit maximizing standard only because of our deference to a situation in which a monopolist could drive a slightly less efficient firm out of the market by charging a price above its own average cost, but then charge a very high price

it is therefore important to look to the price discriminator's costs, rather than his competitor's costs, to determine whether the price discrimination was anti-competitive. If a discriminator's price in the competitive market increases his net revenues in the short run, he will have no need to "subsidize" losses in the competitive market with the profits from his other markets.[32]

Evidence of AMXCO's costs was not cogently presented at trial, apparently because neither side considered it important. However, upon exhaustively searching the record, we find that the judge had much of the relevant data before him and we conclude from this data that the court properly denied Vebco's motion. The record indicates that AMXCO's manufacturing division charged its sales division a price for cooler pads which covered total costs, freight charges, and a "slight profit." Its sales division then resold the goods to distributors at a price based upon the distributors' bargaining power and competition in the area. For example, the manufacturing division sold AMXCO's # 1 pad in bulk to its sales division for 29 cents in 1971. The sales division then listed this pad for sale in bulk to distributors at 71 cents. AMXCO's largest discount of 39.25% (at which only one sale was

because of the difficulty of new entry. This standard should be applied only when the barriers to entry are extremely high. The lower the barriers to entry in a market, the closer to marginal cost a monopolist would have to set its price in order for a plaintiff to prevail as a matter of law, for we see no social utility in insuring the survival of inefficient firms where a new entry is possible.

32 The absence of aid from other markets is a determinative factor in evaluating allegedly predatory conduct and, hence, in determining whether a statutory violation has occurred. *See Borden Co. v. FTC*, 381 F.2d 175, 177 (5th Cir. 1967); *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 842 (7th Cir. 1961).

made) produced a profit to the sales division alone of nearly 15 cents a pad. Thus, not only was the manufacturing division operating at a profit, but the sales division had a gross margin of around 33%. It would appear that AMXCO was selling its cooler pad at a price far above even its average cost.

Moreover, the record indicates that barriers to entry in the cooler pad market were virtually non-existent.[33] Neighborhood hardware store operators could — and did — purchase excelsior wood and hand make their own pads for retail sale. Indeed, the total costs of entering the market on a scale large enough to supply the entire southwestern and far western United States was less than $300,000. The condition of the market and AMXCO's financial data therefore indicate that the price rivalry in the cooler pad market could reasonably be considered pro-competitive and the judge properly denied Vebco's motion.[34]

Finally, we note that, in addition to believing the evidence rebutting Vebco's prima facie case, the jury could reasonably have found that AMXCO established one of the statute's affirmative defenses. The statute

33 We are considerably oversimplifying the barrier to entry discussion. *See* Markovits, Fixed Input (Investment) Competition and the Variability of Fixed Inputs (Investment): Their Nature, Determents, and Significance, 24 Stan. L.Rev. 507 (1972). However, all of the relevant data, including a low minimum efficient scale of operation, significant ability to attract customers of other manufacturers, availability of raw materials, etc., suggest a very low barrier entry in the cooler pad market.

34 In fact, AMXCO's sales manager testified it was never his company's policy to undercut Vebco's price "at all costs." Rather, it would appear that AMXCO was profit-maximizing throughout the entire period, for the sales manager testified that it charged the highest price it could and still make the sale. It never sold at a price at which it could not receive a reasonable profit.

provides that even where price discrimination occurs, a discriminator may not be held liable for a violation of the Act if "his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ." 15 U.S.C. § 13(b) (1973). In order to avail itself of this defense, AMXCO need only have shown that its pricing system was a reasonable method of meeting Vebco's lower price. *Callaway Mills Co. v. FTC*, 362 F.2d 435, 442 (5th Cir. 1966). AMXCO need not have shown that its prices were in fact equal to those of Vebco, "but must only [have shown] facts which would lead a 'reasonable and prudent person' to believe that the granting of the lower prices would in fact meet the equally low price of a competitor."[35]

The facts of this case would enable a jury to believe that AMXCO set its price as a reasonable and prudent firm would, to meet Vebco's lower price. As the facts indicate, the cooler pad market was very competitive and buyers often misinformed a manufacturer of a competitor's price in order to induce a larger discount. When AMXCO learned that Vebco had lowered its price, it responded with a price cut which had no result. It then cut its price a second time in order to regain its lost business. Because of the uncertain and competitive nature of the market, the jury could find that AMXCO met its burden under the affirmative defense of meeting competition.

III

Vebco next argues that the lower court erroneously excluded evidence relating to AMXCO's "specific in-

35 *Id.* at 443-44. In fact, the Federal Trade Commission has held that the meeting competition defense is available to a seller which beats rather than merely meets the price of a competitor. Matter of Beatrice Foods Co., No. 8663 (F.T.C. Dec. 1, 1969).

tent" to monopolize the cooler pad market. Vebco's principal contentions focus upon the trial judge's exclusion of a series of internal AMXCO memoranda and evidence of specific prices AMXCO charged outside the El Paso area.[36]

Between September 24, 1971, and November 19, 1971, various employees and officers of AMXCO exchanged

36 Vebco also challenges the exclusion of other evidence. For example, the court refused to admit a section of Southwest's president's deposition in which he indicated that AMXCO had previously merged with or acquired four companies. All of the alleged acquisitions occurred before 1960. Vebco admits that this testimony appears "rather innocuous" and we agree. The excluded testimony only indicates that AMXCO did not manufacture cooler pads prior to its acquisition of the other companies. Moreover, the acquisitions are of so little temporal relevance to the damage to Vebco that we believe their exclusion was proper. *See, United States v. Maryland and Virginia Milk Producers Ass'n*, 20 F.R.D. 441 (D.D.C. 1957).

The trial judge also excluded evidence of AMXCO's purchase negotiations with Southwest. Vebco claims that the evidence would have convinced the jury that AMXCO was attempting to monopolize when it later negotiated to purchase Vebco. The record reveals that AMXCO made only the most superficial inquiry into the acquisition of Southwest and, in addition, Vebco initiated its purchase negotiations with AMXCO and AMXCO refused to buy Vebco. In context, then, we do not believe that the district judge abused his discretion since the excluded evidence shows little, if anything, about AMXCO's "intent."

Vebco also takes issue with the district judge's exclusion of evidence that AMXCO penetrated the California market by selling to California manufacturers more cheaply than the manufacturers themselves could make cooler pads. We believe that this activity was socially and economically justifiable and deem it irrelevant to a showing of "intent."

Finally, Vebco claims that the trial judge abused his discretion in failing to admit a hearsay statement allegedly made by an AMXCO employee. Inasmuch as the witness through whom the statement was to be introduced could not identify the declarant, making it impossible for AMXCO to rebut the allegation, we believe the district court committed no error. Moreover, even if error was committed in the exclusion of this piece of evidence, we believe that when considered in light of the admitted evidence, that the substantial rights of Vebco were not affected and any error was therefore harmless. Fed.R.Civ.P. 61.

internal memoranda regarding a source of wood for cooler pad production. All of these memoranda were circulated subsequent to the 1971 cooler pad season and, hence, after most of the alleged injury Vebco complains of in this case. Indeed, the memoranda were written after this suit was filed. When Vebco attempted to introduce the memoranda as evidence of AMXCO's "predatory intent," the judge excluded the proffered evidence on grounds of materiality, saying:

> There was nothing in there — they said — if they don't want the wood we'll buy it. That's all right . . . it was all above board.

Vebco now contends that this exclusion, standing alone, is reversible error.

A fair reading of the memoranda supports the district judge's conclusion. The second memorandum indicates that Vebco had ordered wood from a contractor but had refused to take shipment. The memorandum queried whether AMXCO could purchase the wood in order to relieve its own shortages. However, the memorandum noted that AMXCO should proceed carefully in view of the litigation then pending and that Vebco should be given every opportunity to purchase the wood before AMXCO made an offer. The third memorandum said that Vebco had clear title to the wood and that AMXCO would be unable to purchase it, in view of the contractor's business relationship with Vebco. The memorandum did note that AMXCO should inquire the following spring as to the possibility of purchasing the contractor's entire output for use in AMXCO's Fresno operation. The

final memorandum contains the two sentences upon which Vebco bases its argument:

> With reference to the question raised in your last paragraph, I feel that it would be very much in order for you to make a trip to Luna and discuss the possibility of obtaining Reynold's total output of wood for Fresno. This would not only relieve the pressure on Englewood and Cedar City to supply wood to Fresno, but it would also deprive Vebco of their present source of wood and possibly make it rather difficult for them to continue their operation.

It would appear that the memoranda are of so little probative value that the district judge's exclusion was not an abuse of discretion. However, even assuming an error was committed, we do not believe it was of such magnitude as to require reversal. On appeal, errors during the course of a trial which do not affect the substantial rights of the parties are to be disregarded. Fed. R.Civ.P. 61; *see Connolly v. Farmer*, 484 F.2d 456 (5th Cir. 1973); *United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1083 (2nd Cir. 1970); *Bell v. Swift & Co.*, 283 F.2d 407 (5th Cir. 1960). In the context of the other evidence submitted in this lengthy and complex trial — and particularly when compared with the other admitted memoranda — the excluded memoranda would have been only a minor piece of evidence, highly unlikely to have changed the result. Therefore, any error committed in the exclusion of the memoranda was harmless. *See United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1083 (2nd Cir. 1970).

The trial judge also exlcuded evidence of the specific prices charged by AMXCO in about two dozen cities over a three-year period. At trial, AMXCO stipulated that its prices in the El Paso area were different from those charged elsewhere during the relevant period. Likewise, both Vebco's and AMXCO's witnesses repeatedly informed the jury that AMXCO's prices were higher outside the El Paso area. Nevertheless, when the trial judge excluded the exact dollar and cent figures charged elsewhere, Vebco's counsel appeared to argue that the jury simply would not believe AMXCO's prices were higher elsewhere unless it saw the exact figures, and, that Vebco's Robinson-Patman Act claim would therefore be jeopardized. Vebco now assigns the trial court's decision as error, claiming that it affected both the Robinson-Patman Act and Sherman Act claims. In essence, Vebco argues that without the exact numerical data, it was impossible to show that AMXCO was engaged in predation by supporting its price cuts in El Paso with higher prices elsewhere.

We do not agree. Vebco certainly had the right to establish price differentials between AMXCO's prices in El Paso and those elsewhere, *Cornwell Quality Tools Co. v. C. T. S. Co.*, 446 F.2d 825 (9th Cir. 1971), an opportunity of which it availed itself. But we see no merit in requiring a district court to permit the introduction of exact dollar figures, since aid from other markets, if present in this case, could be established merely by showing that a higher price was charged elsewhere. Moreover, as we have explained, a price differential alone would not show predation; unless AMXCO was selling below marginal cost, it would

have no need of aid from other markets and the dollar figures elsewhere would therefore be irrelevant.

IV.

Vebco also contends that the district court erred in its instructions to the jury, some of which "effectively increased the plaintiffs' burden of proof." In evaluating the adequacy of a charge to the jury, we consider the charge as a whole, and if the instructions taken together properly express the law applicable to the case, "there is no just ground of complaint, even though an isolated and detached clause is in itself inaccurate, ambiguous, incomplete, or otherwise subject to criticism." *Delancey v. Motichek Towing Service, Inc.*, 427 F.2d 897, 901 (5th Cir. 1970) *quoting Nolan v. Greene*, 383 F.2d 814, 816 (6th Cir. 1967).

Only two of the alleged errors in the jury charge merit extensive discussion.[37] First, Vebco assigns as

37 In addition to the alleged errors discussed in the text, Vebco complains of other irregularities in the jury charge. Vebco claims that the trial court should have instructed the jury with respect to the purpose of the antitrust laws. We believe that the district court was correct in merely explaining the laws to the jury, since the charge apprised the jury of the meaning of the laws and fairly presented the issue to them. Vebco also claims that the district court erred by instructing the jury as to the meaning of "monopolize" and "attempt to monopolize." Since Vebco was suing AMXCO under Section 2 of the Sherman Act, which prohibits attempts to monopolize, we hardly think it error for the judge to have defined the relevant terms for the jury's benefit.

Lastly, Vebco argues that the district court erred in failing to instruct the jury on the proper consideration of the parties' stipulation. The court instructed the jury that "[s]tipulations are facts which are stipulated to and agreed to by counsel, that have been read to you and will be accepted by you as the evidence, and it is agreed to as being considered as facts by you. Of course, you determine, again, what weight should be given to it." We believe, in the context of the entire charge, that the court did not err in giving this instruction. *See Worden v. Tri-State Ins. Co.*, 347 F.2d 336, 343 (10th Cir. 1965). Moreover, the stipulation as read to the jury said, "[t]he following facts . . . are to be taken as true by the Members of the Jury."

error the trial judge's instruction that the phrase "may be substantially to lessen competition" means "a reasonable probability or possibility, not imaginary or elusive, of lessening competition must exist in order for there to be a 'substantial lessening.' " Vebco argues that the definition given requires a higher standard of proof than the proper definition which includes only the phrase "reasonable possibility" of lessening competition.

While the Supreme Court has never specifically forbidden the "probability" construction, it has employed the "reasonable possibility" language. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948). Since that time, a controversy has raged over the doctrinal formulation of the requisite inimical potential. In 1959 the Second Circuit opted in favor of "substantially probable," *see Standard Motor Products, Inc. v. FTC*, 265 F.2d 674, 676 (2nd Cir. 1959), *cert. denied*, 361 U.S. 826, 80 S.Ct. 73, 4 L.Ed.2d 69 (1959), but the Tenth Circuit has approved the "reasonable possibility" formulation, *see Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 952 (10th Cir. 1959), *cert. denied*, 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960). Indeed, courts have frequently employed "possibility" and "probability" together as the district court did here. *See, e.g., Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 841 (7th Cir. 1961); *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 792 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206, 73 S.Ct. 245, 97 L.Ed. 245 (1952). The vacillation between the standards has even prompted one commentator to conclude that the verbal distinction between the two phrases "has become an empty quibble without operational significance." *See* F. Rowe, *supra* at 136.

We believe that any difference between the two formulations is trivial. At any rate, the use of the disjunctive by the district court ("reasonable probability or possibility") would give the plaintiff the benefit of the arguably lesser standard.

Finally, Vebco claims the district court inconsistently defined the relevant geographic market, thus materially misleading the jury. Vebco contended that the relevant market was an issue for the jury, while AMXCO claimed that the relevant market was only the El Paso area. In his charge, the district court first said that the market was a question of fact to be determined by the jury and repeatedly referred to the relevant market as the area in which the two parties competed. However, later in the charge when discussing the Sherman Act count, the court appeared to instruct the jury that the relevant market was the El Paso area as a matter of law. While such an apparent inconsistency could mislead the jury, we do not believe, under the facts of this case, that any error committed would "affect the substantial rights of the parties." Fed.R.Civ.P. 61. As we have indicated, the judge properly excluded, for various reasons, virtually all the evidence presented which dealt with AMXCO's actions outside the El Paso area. The only evidence relevant to this point which the judge admitted was the stipulation and testimony to the effect that AMXCO charged higher prices in other areas than in El Paso. In this context, then, it is difficult to ascertain any damage to Vebco caused by the charge. If Vebco could not even prove antitrust violation in the El Paso area to the satisfaction of the jury, it is highly dubious whether an allegation of monopolizing a greater area

— in the absence of evidence of actions outside of El Paso — would have improved its position. We therefore believe any error committed was harmless.

We have carefully reviewed appellant's other assignments of error and we find them meritless.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

INTERNATIONAL AIR INDUSTRIES, INC. and VEBCO, INC.,
Plaintiffs,

versus NO. EP-71-CA-91

AMERICAN EXCELSIOR COMPANY,
Defendant.

JUDGMENT

The above captioned action having been tried before a jury in this Court, the jury having found for the Defendant American Excelsior Company by its general verdict, and the jury having further answered all special questions propounded to it in favor of the Defendant as follows:

1. Question: Did Defendant American Excelsior Company unlawfully discriminate in price in the sale of evaporative cooler pads and therefore violate the Robinson Patman Act?

Answer: No.

2. Question: Was Plaintiff Vebco, Inc. damaged as a proximate cause of such violation, if any?

Answer: No.

3. Question: Did Defendant American Excelsior Company attempt to monopolize the evaporative cooler pad market and therefore violate the Sherman Antitrust Act?

Answer: No.

4. Question: Was Plaintiff Vebco, Inc. damaged as a proximate cause of such violation, if any?

Answer: No.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that Plaintiffs International Air Industries, Inc. and Vebco, Inc. take nothing, that the action by Plaintiffs be dismissed on the merits, and that Defendant recover of Plaintiffs its costs of action.

SIGNED AND ENTERED this 3 day of July, 1973.

/s/ ERNEST GUINN
United States District Judge

APPENDIX C

§ 13. Discrimination in price, services, or facilities — Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of

commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Payment or acceptance of commission, brokerage or other compensation

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representaive, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Payment for services or facilities for processing or sale

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities for processing, handling, etc.

(e) 'It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities, connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Knowingly inducing or receiving discriminatory price

(f) It shall be unlawful for any person, engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

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§ 15. Suits by Persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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§ 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the

provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

AMENDMENT VII — CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.